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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. [redacted] 6

D. W. McEACHERN, ADMINISTRATOR OF THE ESTATE OF S. C. McEACHERN, DECEASED,

Petitioner,

vs.

J. T. ROSE, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. A. SUTHERLAND,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 750

D. W. McEACHERN, Administrator of the Estate of S. C. McEachern, Deceased,

Petitioner,

vs.

J. T. ROSE, Former Collector of Internal Revenue for the District of Georgia.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petition.

D. W. McEachern, Administrator of the estate of S. C. McEachern, deceased, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above case on November 9, 1936 (R. 81), reversing the judgment of the United States District Court for the Northern District of Georgia.

Summary Statement of Matter Involved.

The petitioner, as administrator of the estate of S. C. McEachern, deceased, brought this suit seeking recovery

of amounts by which McEachern's estate overpaid its Federal income taxes for the years 1929, 1930 and 1931 (R. 1-18). The respondent for defense asserted that petitioner was estopped from recovering such overpayments by reason of the fact that a larger amount of income tax due for the year 1928 remained unpaid, collection of the 1928 tax being barred by the statute of limitations (R. 19-30). The overpayments of tax for 1929, 1930 and 1931, and the alleged underpayment of tax for 1928 arose as follows:

In 1924 the petitioner's intestate, hereinafter called the "decedent," sold 500 shares of stock in the Industrial Life & Health Insurance Company for a total consideration of $300,000.00, payable $30,000.00 in cash at the time of said sale, and the balance in quarterly installments of $7,500.00 each (R. 3, 19).

As permitted by law, the decedent elected, in returning his profit from the sale for Federal income tax, to return such profit on the installment basis (R. 20). The decedent died on December 12, 1929, at which time $150,000.00 of the purchase price remained unpaid (R. 4, 19).

In 1929, 1930 and 1931 the decedent's estate collected a part of the aforesaid installment obligations of $150,000.00 which had remained unpaid at decedent's death (R. 3, 8, 13, 19, 22, 25). It is not disputed that such collections constituted income to the decedent's estate only to the extent that such collections exceeded the value of the installment obligations at the date of decedent's death, this result following from the fact that upon decedent's death such installment obligations became capital assets in the hands of the decedent's estate at their then value. However, in the returns filed for the decedent's estate for 1929, 1930 and 1931 (R. 33-50) the petitioner erroneously continued to report the income from such collections on the same basis on which the decedent would have been required to report the same if he had continued to live, and as a result the

petitioner erroneously reported for 1929, 1930 and 1931 an excessive amount of income from such collections. The excessive income thus reported resulted in the overpayments of tax for 1929, 1930 and 1931, which are sought to be recovered in this suit (R. 1-18). The amount of recovery to which the petitioner is entitled is not in dispute, the only issue being whether or not the petitioner is estopped from any recovery at all.

The alleged underpayment of tax for 1928 arises under Section 44(d) of the 1928 Revenue Act. Section 44(d) was new in the 1928 Revenue Act and the prior Revenue Acts contained no similar provisions. Under Section 44(d) the passing or transmission of the $150,000.00 of unpaid installment obligations from the decedent to his estate was declared to result in the accrual of income to the decedent in the year of his death in an amount equal to the profit which the decedent would have realized if he had sold such installment obligations on the date of his death for their then market value. Such alleged income thus deemed to accrue to the decedent under Section 44(d) was not reported in the income tax return filed for the decedent for 1928. Prior to the 1928 Revenue Act it was not taxed as income to anyone.

The petitioner contended in the courts below, and still contends that, as applied to the facts of this case, Section 44(d) of the 1928 Revenue Act is unconstitutional under Article 1, Section 2 of the Constitution, and is not authorized by the Sixteenth Amendment to the Constitution, in that Section 44(d) seeks to tax the decedent upon income which he never realized.[1] If Section 44(d) is unconstitutional, then there is no underpayment of tax for 1928.

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[1] Section 44(d) attempts to tax whatever appreciation took place in the value of the $150,000.00 of non-interest bearing installment obligations between the date of their receipt in 1924 and the date of decedent's death in 1928. On no possible theory was this appreciation ever income to the decedent within the meaning of the Sixteenth Amendment.

The respondent contended that Section 44(d) was constitutional; that the decedent's income tax for 1928 was therefore underpaid; and that such underpayment for 1928 furnished the basis for an estoppel against petitioner with respect to the overpayments sought to be recovered for 1929, 1930 and 1931.

The petitioner contended further that, even assuming Section 44(d) was constitutional, there was still no basis for estoppel, because, among other reasons, the Commissioner of Internal Revenue had timely knowledge of all of the material facts with reference to the alleged underpayment of tax for 1928, and simply overlooked their legal significance, so that his failure to collect the alleged tax for 1928 was in no way due to his having been misled by the petitioner. In support of this contention, the petitioner proved that on December 12, 1929, the petitioner filed a Federal estate tax return for the decedent's estate, which estate tax return disclosed the existence of the unpaid installment obligations in question, and disclosed that such obligations passed and were transmitted upon the death of the decedent, to his estate (R. 51, 52). The passing or transmission of these installment obligations from the decedent to his estate was the event which brought into operation the provisions of Section 44(d), under which the alleged tax liability for 1928 arose. The statute of limitations upon the collection of additional tax for 1928 did not expire until approximately fifteen months after the estate tax return was filed. The estate tax return was investigated with usual care and the Field Agent's Report thereon was made and transmitted to the Bureau of Internal Revenue in Washington on May 31, 1930 (R. 65), at which time the statute of limitations on collection of additional income tax for 1928 had still over nine months to run.

The respondent admitted that all of the mistakes made by the petitioner were innocent mistakes of law, and that

the petitioner at all times acted in good faith (R. 65, 66). *The respondent did not even seek to introduce any evidence to show that the Commissioner's failure to collect the alleged tax for 1928 was due to his having been misled by the petitioner.*

The District Court, holding that there was no estoppel, in any event, and that it was therefore unnecessary to pass upon the constitutionality of Section 44(d), directed a verdict and entered judgment in favor of the petitioner (R. 31, 32). The Circuit Court of Appeals reversed the judgment of the District Court and held, first, that Section 44(d) is constitutional, and, second, that because of the barred tax liability for 1928, the petitioner is not entitled to recover the admitted overpayments for 1929, 1930 and 1931 (R. 76-81). The Circuit Court of Appeals stated in its opinion that "Sometimes in these actions the inability to recover the money is spoken of as springing from estoppel; sometimes it is put on the more general ground of the inequities of the case" (R. 80, 81).

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals in the case at bar is in conflict, on the question of estoppel, with the decision of this Court in *Helvering* v. *Salvage,* 297 U. S. 106, and with the decision of the Circuit Court of Appeals for the Second Circuit in the same case, reported as *Salvage* v. *Commissioner,* 76 F. (2d) 112; and is also in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Union Pacific R. Co.,* 86 F. (2d) 637; and is also in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *A. G. Hull* v. *Commissioner,* — F. (2d) —, decided January 5, 1937, published in 1937 Commerce Clearing House Federal Tax Service, Paragraph 9035.

2. The question of the possible scope and extent of estoppel in Federal income tax cases is a question on which, as is shown in the brief in support hereof, the Circuit Courts of Appeals have adopted widely divergent views, and is an important question of Federal law which is involved in a large and constantly increasing number of cases. Great confusion already exists, and greater confusion seems likely to arise, if the fundamental question involved is not settled by this Court.

3. As is shown in the brief in support hereof, the decision of the Circuit Court of Appeals in the case at bar is substantially similar, on the question of estoppel, to the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Commissioner* v. *Farren*, 82 F. (2d) 141. This Court granted a petition for certiorari in the *Farren* case, *supra*, on June 1, 1936 (Nos. 973 and 974, October Term, 1935; Nos. 43 and 44, October Term, 1936), but the proceedings in this Court in the *Farren* case were dismissed upon stipulation of the parties thereto on October 26, 1936.[2] It is respectfully submitted that the same reasons which justified the granting of the petition for certiorari in the *Farren* case, *supra*, are present in the case at bar and justify the granting of this petition.

WHEREFORE it is respectfully prayed that the petition be granted.

W. A. SUTHERLAND,
Counsel for Petitioner.

February, 1937.

[2] The circumstances in connection with the dismissal of the *Farren* case, after this Court had granted certiorari to the taxpayer, over the opposition of the Solicitor General, and after the taxpayer had filed his brief on the merits, seem significant. According to our information, the Government initiated the settlement of the case, and in order to effect the settlement and secure the dismissal of the case, the Government gave up approximately 75% of the amount in dispute, all of which it would have been entitled to retain if the lower court's holding of estoppel had been upheld by this Court.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

There was no opinion by the District Court. The opinion of the Circuit Court of Appeals is reported at 86 F. (2d) 231 and will be found at page 76 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on November 9, 1936 (R. 81). On February 1, 1937, Honorable Benjamin N. Cardozo entered an order of this Court extending the time for filing a petition for certiorari in the case at bar to and including February 24, 1937. Jurisdiction to issue the writ requested is found in the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case, Statutes Involved.

A statement of the case will be found in the petition. The statutes involved appear in the appendix.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In holding that the Petitioner is estopped, by reason of the alleged barred tax liability for 1928, from recovering the overpayments of taxes for 1929, 1930 and 1931.

2. In holding that on equitable principles springing from estoppel, the petitioner is precluded, by reason of the alleged barred tax liability for 1928, from recovering the overpayments of taxes for 1929, 1930 and 1931.

3. In holding that the petitioner is not entitled *ex aequo et bono* and in good conscience to recover the overpayments of taxes for 1929, 1930 and 1931.

4. In holding that Section 44(d) of the Revenue Act of 1928 is constitutional, and in failing to hold that such section is unconstitutional under Article 1, Section 2 of the Constitution and is not authorized under the Sixteenth Amendment to the Constitution, in that it seeks to tax the decedent upon income which he never realized.

5. In failing to hold that for the following reasons there is no estoppel in the case at bar:

(a) The Commissioner of Internal Revenue was timely advised of all the material facts in connection with the alleged barred tax for 1928, and the Commissioner's failure to collect the alleged tax for 1928 was therefore not due to his having been misled by the petitioner.

(b) The petitioner's failure to report the alleged omitted income for 1928 was due solely to an innocent mistake of law.

(c) The petitioner does not seek in this suit to change any position previously taken by it, which position has resulted, or will result, in any loss of revenue to which the Government was entitled.

(d) Section 44(d) of the Revenue Act of 1928 is unconstitutional and there is therefore no underpayment of tax for 1928 and no injury to the Government to constitute the basis of an estoppel.

6. In failing to hold that the substantive provisions of the statutes of limitation and the statutory policy of taxing income in the year when it is received render invalid the respondent's defense based on the alleged barred tax liability for 1928, in the absence of estoppel.

7. In failing to hold that the petitioner was entitled to recover the overpayments of taxes for 1929, 1930 and 1931.

8. In reversing the judgment of the District Court.

ARGUMENT.

I. The decision in the case at bar is in conflict with the decisions of the Circuit Courts of Appeals for the Second Circuit and the Fourth Circuit.

In *Salvage* v. *Commissioner*, 76 F. (2d) 112 (C. C. A. 2d), the taxpayer made a bargain purchase of stock in 1922, under such circumstances that he received income in 1922 in an amount equal to the difference between the purchase price paid by him for the stock and the value of the stock when received by him. The taxpayer failed to report in 1922 the income which he thus received. In determining his capital gain on the subsequent sale of the stock in 1929, the taxpayer sought to use the correct capital base, namely, the value of the stock at the time when received by him in 1922. The statute of limitations had run on the collection of additional tax for 1922. The Commissioner relied on estoppel. The Circuit Court of Appeals for the Second Circuit held that the capital base claimed by the taxpayer was correct; that the failure to disclose the 1922 income apparently resulted from an innocent mistake of law; that there was no false representation of fact; and that nothing gave support to the claim of estoppel. This Court affirmed in *Helvering* v. *Salvage*, 297 U. S. 106, holding that the defense of estoppel was not properly raised and should have been passed by the court below, and holding also that "Furthermore, the facts disclosed give it no support".

In *Commissioner* v. *Union Pacific R. Co.*, 86 F. (2d) 637 (C. C. A. 2d), the taxpayer had sold property at a profit in 1917 and 1920. Through mistake the taxpayer reported the profit from such sales as income for 1926, whereas such

profit should have been reported as income in 1917 and 1920. After the statute of limitations had barred the collection of additional tax for 1917 and 1920, the taxpayer sought to have its tax liability for 1926 determined upon a correct basis, by eliminating from its income for 1926 the profit which should properly have been reported for 1917 and 1920. The Commissioner relied upon estoppel: The Circuit Court of Appeals for the Second Circuit held that the person claiming the benefit of estoppel must have been ignorant of the true facts and must have been adversely affected by the acts of the person against whom the estoppel is claimed; that the Commissioner had timely knowledge of all of the material facts, and that therefore there was no estoppel. The Court stated further:

> "An unqualified application of the rule that failure to report income creates estoppel would mean that an equitable remedy can serve to nullify the substantive provisions of the statute of limitations as well as the statutory policy that income is to be allocated to its appropriate year, Burnet *v.* Sanford & Brooks Co., 282 U. S. 359, 51 S. Ct. 150, 75 L. ed. 383, despite the loss of revenue, Helvering *v.* St. Louis S. W. Ry. Co., 66 F. (2d) 633 (C. C. A. 8)."

In *A. G. Hull* v. *Commissioner* (C. C. A. 4th, Jan. 5, 1937), — F. (2d) —, published in 1937 Commerce Clearing House Federal Tax Service, Paragraph 9035, the taxpayer received $100,000.00 as consideration for his grant of an option to purchase property owned by him. The Commissioner sought to treat the sum so received as income of the taxpayer for 1926. The taxpayer denied that the receipt of such sum constituted income to him at any time, but contended in the alternative that it was income to him in 1925 if at all. The taxpayer had not reported such sum as income in either 1925 or 1926. The statute of limitations had run on the collection of additional tax for 1925 and the

Commissioner relied on estoppel. The Circuit Court of Appeals for the Fourth Circuit held that if the amount in question was income at any time, it was income in 1925 and not in 1926; and held further that there was no estoppel, since the Commissioner had full knowledge of all the material facts long before the statute of limitations expired.

In both the *Salvage* case, *supra,* and the *Union Pacific R. Co.* case, *supra,* the Circuit Court of Appeals for the Second Circuit cited and relied upon *Sugar Creek Coal & Mining Co.*, 31 B. T. A. 344. In the *Sugar Creek* case, as in the *Salvage* and *Union Pacific R. Co.* cases, *supra,* there was a barred tax claim against the taxpayer for prior years resulting from the taxpayer's failure to report income in such prior years. The Commissioner claimed that the taxpayer was estopped from seeking a correct adjustment of his taxes for a later year. The Board of Tax Appeals held that since the Commissioner had timely knowledge of all of the material facts and was not misled to his prejudice by the taxpayer, there was no estoppel. The Board said, with reference to the Commissioner's attempt to assert the defense of estoppel under such circumstances:

> "This proposition would operate as a complete frustration of the statute of limitations. Congress having expressly provided such a bar, the Commissioner would thrust it aside whenever it seemed to him or to the Board or the courts unfair, although there is in the act neither express nor implied exception of such a nature. This is also true of refunds of overpayments, for the Commissioner may not act merely upon his sense of fairness to allow a claim long after it is outlawed by statutory limitation. In the absence of fraud or at least of conscious deception, Congress has fixed a period of time as a limit upon collectibility, and this may not give way to an elusive concept of fairness.
>
> "There may be a tinge of unfairness in the thought that a taxpayer may, because of the statutory limita-

> tion, avoid a tax otherwise unquestionably due. But, on the other hand, it may be unfair that an honest taxpayer should be made to answer for an innocent mistake long afterward. These matters Congress has considered and in its legislative wisdom it has enacted the limitation period at the price of losing the tax. The administrative officer may not interpose his judgment to the contrary, Dupree *v.* Mansur, 214 U. S. 161."

The view taken by the Circuit Courts of Appeals for the Second Circuit and Fourth Circuit and by the Board of Tax Appeals, in the cases cited above, is recommended in concise terms in a recent text by the present Undersecretary of the Treasury as follows:

> "If the taxpayer is to be estopped, the usually accepted analysis requires that he shall have made some representation of fact; that the Commissioner shall have relied upon it; and shall have changed his position to his detriment. In some cases these three elements can be shown, *but the courts should be more insistent than they have been upon actual proof on each point, as distinguished from vague assertions of unfairness by counsel for the Treasury.*"[1] (Italics supplied.)

In the case at bar, the Circuit Court of Appeals, on similar facts, took the conflicting view and relied upon the vague ground of unfairness rather than upon proof of the recognized elements of estoppel. The petitioner contended that there was no estoppel in the case at bar because, among other reasons, the Commissioner had timely knowledge of all of the material facts and was therefore not misled to his prejudice by the petitioner. The Circuit Court of Appeals apparently recognized this fact, for it stated that the petitioner's inability to recover is based not on a "technical estoppel", but on broad equitable principles "spring-

[1] Roswell Magill, Taxable Income (1936), pp. 164, 165.

ing from estoppel'' (R. 80, 81). The Circuit Court of Appeals held that the petitioner was not entitled *''ex æquo et bono''* (R. 80) or ''in good conscience'' (R. 81) to the relief sought, which of course is merely equivalent to holding that petitioner's claim is ''unfair''.

As stated above, the Circuit Court of Appeals for the Second Circuit and the Fourth Circuit, in the cases cited above, insisted upon proof of the recognized elements of estoppel, as distinguished from vague assertions of unfairness by the Government attorneys. In the case at bar the Circuit Court of Appeals on similar facts failed to require proof of the recognized elements of estoppel and instead rested its decision on the vague ground of unfairness. The decision in the case at bar is therefore clearly in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in the *Salvage* and *Union Pacific R. Co.* cases, *supra,* and with the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Hull* case, *supra.*

II. The Farren Case.

In *Union Pacific R. C., supra,* the Circuit Court of Appeals for the Second Circuit expressly recognized the conflict with *Commissioner* v. *Farren,* 82 F. (2d) 141 (C. C. A. 10th).

In the *Farren* case, *supra,* the taxpayer received stock in 1918 as compensation for services. Under an innocent mistake of law, the taxpayer failed to report the income which he thus received in 1918. In determining his gain upon the subsequent sale of the stock in 1926, he sought to use the correct capital base, namely, the value of the stock when received by him in 1918. The statute of limitations barred the collection of additional tax for 1918, and the Commissioner relied upon estoppel. The Circuit Court of Appeals for the Tenth Circuit sustained the Commissioner's defense, on general grounds of unfairness, relying principally

upon language used by this Court in *Stearns* v. *United States,* 291 U. S. 54, to the effect that "no one shall be permitted to found any claim upon his own inequity, * * * "[2]

In the *Farren* case, as in the *Salvage* case, *supra,* there was no estoppel, because the failure to report income in the prior year was due solely to an innocent mistake of law, and there was no misrepresentation of fact. In its decision in the *Farren* case, the Circuit Court of Appeals for the Tenth Circuit recognized the conflict with the *Salvage* case, but considered that it was not bound by this Court's decision in the *Salvage* case, since this Court's decision in the *Salvage* case was rested in part on a procedural point.

The decisions of the Circuit Courts of Appeals in the case at bar and in the *Farren* case are substantially similar, as is shown by the following:

(a) The facts in the two cases were similar in that in each case the taxpayer sought a correct adjustment of his tax liability for a later year, and in each case there was alleged to be a barred claim against the taxpayer for additional taxes for a prior year.

(b) In each case the defense relied upon was estoppel.

(c) In neither case were the recognized elements of estoppel proven.

(d) In each case the Court rested its decision ultimately upon the vague ground of unfairness, and failed to require proof of the recognized elements of estoppel.

The two courts identified their respective decisions to the same extent with the doctrine of estoppel, the court saying in the case at bar: "Sometimes in these actions the inability to recover the money is spoken of as springing from estoppel,

[2] *Stearns* v. *United States, supra,* involved a clear case of estoppel by conduct, and therefore, when read in the light of its facts, does not support the conclusion reached in the *Farren* case.

* * *" (R. 80, 81); while in the *Farren* case, the court there said: "Sometimes the resulting disability has been characterized as an estoppel, * * *."

It follows that the same questions are involved in the case at bar as in the *Farren* case; that the case at bar, equally with the *Farren* case, is in conflict with the *Union Pacific R. Co.* case, *supra;*[3] and that the case at bar will bring before this Court for review the same questions which were before this Court in the *Farren* case. The questions involved in this case would undoubtedly have been settled by this Court in its decision in the *Farren* case, had not that case been dismissed in this Court by the parties.

III. Importance of Question Involved.

The question of the proper scope of the doctrine of estoppel in income tax cases, as presented by the clear conflict between the Circuit Courts of Appeals above referred to, is a question of vital importance in the administration of the income tax laws. The Bureau of Internal Revenue and the Department of Justice are constantly seeking to rely upon so-called "estoppel" in every conceivable type of situation, regardless of whether one or more of the elements of equitable estoppel, as generally understood, are absent.[4]

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[3] As stated above the Circuit Court of Appeals for the Second Circuit, in *Union Pacific R. Co., supra,* expressly recognized the conflict with the *Farren* case.

[4] Maguire and Zimet, "Hobson's Choice and Similar Practices in Federal Taxation", 48 Harvard Law Review 1281, at p. 1294, state: "The term estoppel is now constantly on the lips of Bureau employees, but with such vague and shifting significance as to bewilder any serious thinker."

Paul & Mertens, Law of Federal Income Taxation, 1936 Supp., Sec. 53.13, state: "Estoppel does not seem to have been strenuously pressed by government attorneys until about 1929, and at first the plea did not meet with conspicuous success. However, the doctrine of estoppel, notwithstanding some earlier Government reverses, soon became firmly imbedded in tax law. As will be noted from the discussion below, the Government now resorts to the defense on every possible occasion."

Equitable estoppel, as applied to cases other than income tax cases, is a doctrine which has been developed by the courts over a period of many years. Its limits are well defined. The elements necessary to constitute an equitable estoppel may be summarized as follows: (a) misrepresentation of fact by the party sought to be estopped; (b) reliance thereon by the other party in ignorance of the true facts; and (c) action thereon by such other party to his prejudice. In cases other than income tax cases, the application of equitable estoppel within the recognized limits as just described, is recognized as being sufficient to protect against unfairness in the assertion of legal rights.

However, the doctrine of estoppel, as Government attorneys have sought to apply it with increasing frequency in income tax cases, has no relation whatever in scope to true estoppel as defined above. Sometimes in the attempt to extend the doctrine beyond its proper scope, the designation of "estoppel" or "equitable estoppel" is retained; sometimes the attempted defense is called "quasi-estoppel"; sometimes it is asserted to rest upon "broad equitable principles based on estoppel". In the case at bar, the Respondent in his pleadings and throughout the entire case has constantly described his defense simply as "estoppel" (R. 22, 25, 29, 31, 67). The Circuit Court of Appeals rested its decision in the case at bar upon so-called broad equitable principles "springing from estoppel" (R. 81). Whatever the designation used, it is clear that in every case the attempted extension of estoppel is based ultimately upon *vague assertions of unfairness.*

The logical application of the decision of the court below, in the case at bar, would largely wipe out the defense of the statute of limitations in income tax cases, as was stated to this Court in the *Farren* petition for certiorari. The question is therefore of such importance, in such a large number

of cases, that it should challenge the attention of this Court, even if there were no conflict. However, it has been shown above that a clear conflict does exist, the Circuit Courts of Appeals for the Second and Fourth Circuits having indicated that such *vague assertions of unfairness* as are here relied upon were not enough, and having insisted upon proof of the recognized elements of estoppel; while in the case at bar and in the *Farren* case, the Circuit Courts of Appeals for the Fifth and Tenth Circuits have adopted the conflicting view.

Under the circumstances, to avoid great and growing confusion, the desirability of an early decision by this Court, resolving this conflict, seems apparent.

Conclusion.

The question involved in this case is an important question of Federal law, on which the decisions of the Circuit Courts of Appeals are in conflict, and it is therefore respectfully submitted that this petition for certiorari should be granted, and the conflict resolved.

Respectfully submitted,

W. A. SUTHERLAND,
Counsel for Petitioner.

APPENDIX.

Section 44(d), Revenue Act of 1928.

"Gain or loss upon disposition of installment obligations.—If an installment obligation is satisfied at other than its face value or distributed, transmitted, sold, or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and (1) in the case of satisfaction at other than face value or a sale or exchange—the amount realized, or (2) in case of a distribution, transmission, or disposition otherwise than by sale or exchange—the fair market value of the obligation at the time of such distribution, transmission, or disposition. The basis of the obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full."